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Supreme Court of the United States

OCTOBER TERM, 1952

No. 240

THE CRUMMER COMPANY, and R. E. CRUMMER & COMPANY,

Petitioners,

vs.

JESSIE BALL duPONT, et al., AS TRUSTEES, ETC., et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OCTOBER TERM, 1952

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vs.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below

The findings of fact and opinion of the District Court (R. pp. 628-643) are unreported.

The opinion of the Court of Appeals for the Fifth Circuit (R. 663-665) is reported in 196 F. 2d 468.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C., Section 1254(1). In the decision below the Court of Appeals for the Fifth Circuit ruled on appeal that the transfer order of the District Court under 28 U.S.C. 1404(a) was interlocutory and not falling within one of the

exceptions provided by statute was not appealable and dismissed the appeal.[1] 196 F. 2d 468.

This Court has not normally exercised its power to issue certiorari under Section 1254(1) to review a decree of a Circuit Court of Appeals on an appeal from an interlocutory order of a District Court, in absence of some exceptional reason. *American Construction Co.* v. *Jacksonville T. K. R. Co.*, 148 U.S. 372, 384. No valid exceptional reason exists in the case at bar.

Questions Presented

As we view it, the questions presented[2] are as follows:

1. Did the Court of Appeals correctly decide that the transfer order under 28 U.S.C. 1404(a) was the type of interlocutory order which was not appealable?

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[1]On April 24, 1951 the Court of Appeals had previously reviewed this same transfer order upon almost the identical record now before this Court, upon the petitioners' motion for leave to file a petition for mandamus directed to the District Judge. The Court of Appeals denied the motion and this Court refused to grant certiorari to review such denial on December 11, 1951. *Crummer Co. et al.*, v. *Barker*, 96 L.Ed. 139 (Adv. Op.)

[2]Petitioners assert questions presented are as follows (Pet. p. 3, 4):

1. Whether pursuant to the standards established by this court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), a transfer order purportedly entered under Section 1404(a) of Title 28, U.S. Code, should stand unreversed in the light of the facts * * *.

2. Whether an erroneous transfer order under Section 1404(a) of Title 28, U.S. Code, is reviewable before trial, either by appeal or by extraordinary writ, considering the facts that * * *.

3. Whether a plaintiff can be forced to defend a counterclaim in the transferee forum, when that counterclaim could not have been brought there as an original action, because of improper venue.

Petitioners claim that the facts upon which they seek certiorari are undisputed (Pet. Brief, p. 3, f. note 1). This contention is erroneous since the facts as found by the District Judge (R. p. 628-642) and as stated in this brief (p. 3 to 8) are at considerable variance from the facts, and the conclusions drawn therefrom, as set forth by petitioners

2. Did the Court of Appeals properly refuse to vacate and set aside the transfer order by their refusal to grant petitioners' second petition for extraordinary relief?[3]

Statement of Facts

A. Scope of the Action.

While denominating their action one to recover treble damages for an alleged conspiracy to monopolize interstate trade in defaulted Florida municipal securities and the refunding thereof, the plaintiffs, which are both Delaware corporations, basically ground their action upon four allegedly malicious and improper abuses of legal process, around which primarily all the overt acts averred in the elaborate and embroidered Complaint revolve,[4] to wit:

(1) A criminal prosecution of, among others, the plaintiffs, authorized by the Attorney General of the United States and filed in 1944 by the United States Attorney in the State of Kansas, together with the preliminary investigation, conducted under appropriate authorization by the Post Office Department and the Securities and Exchange Commission, through their identified employees, giving rise to such criminal prosecution (R. pp. 31-41, inclusive);

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[3]The Court of Appeals had previously reviewed the same transfer order on petitioners' motion for leave to file a petition for writ of mandamus on April 24, 1951 (Pet. Brief at p. 14). There have been no further proceedings or new facts relating to the transfer order since that first review of the transfer order.

[4]It will be noted that in the petitioners' brief, they describe the overt acts charged against the defendants under their headings: (1) "instigation of federal criminal prosecutions"; (2) "interference with the procurement by The Crummer Company of a license to do business in Florida as a dealer in municipal securities"; and (3) "the instigation of civil litigation". (Brief of Petitioners, pp. 5 and 6. *No one of these overt acts occurred in the Orlando Division of the Southern District.* At least one of them took place wholly in the Tallahassee Division of the Northern District, to which this suit was properly transferred, and another partially was centered in the Tallahassee Division.

(2) Investigations conducted in January, 1943 and 1944, at Tallahassee, Florida, by the Securities Commission of the State of Florida, a statutory body authorized under Chapter 517, Florida Statutes Annotated, to determine whether to grant the plaintiff, The Crummer Company, a license to do business as a security dealer within the State of Florida, during one of which investigations certain of the defendants allegedly testified, and after which plaintiffs assert in their Complaint the Commission improperly denied the plaintiff such license (R. pp. 41-4, inclusive);

(3) A legislative investigation authorized at Tallahassee, Florida, in May, 1941, but not activated until 1942 by Executive Proclamation with funds made available by the Governor of Florida, into the refunding of defaulted Florida taxing unit securities, including those of the plaintiff, R. E. Crummer & Company, carried out under the authority of a House Resolution duly approved by the House of Representatives of the State of Florida and under an Executive Proclamation of the Governor of Florida out of the emergency funds subject to the Governor's orders (R. pp. 50-52).

(4) Resort in 1942 and 1944 by certain of the defendants to suits in the federal and state courts for declaratory judgments to determine the validity of certain of the refunding contracts of the plaintiff, R. E. Crummer & Company (R. pp. 44-9, inclusive).

The Complaint, also, charges as overt acts against the defendants the refusal in the latter part of 1941 by the State Board of Administration of the State of Florida as to Sarasota County, and the governing county board of Lee County, Florida, to carry out certain alleged contractural rights of the plaintiff R. E. Crummer & Company (R. pp. 49-50).

The defendants denied generally the broad allegations of wrong-doing leveled by the plaintiffs at the individual

defendants, Federal officials charged with the enforcement of criminal law and State legislative and administrative officers engaged in the discharge of duties under appropriate legislative resolution or by virtue of pertinent statutory authority, and certain of the defendants countered with the charge that the plaintiffs through improper means had actually achieved an illegal monopoly in the securities of financially embarrassed Florida taxing units deriving therefrom unconscionable improper gains. Cf. *United Mutual Life Ins. Co.* v. *Avon Park*, 1940, 311 U.S. 138, rehearing denied 311 U.S. 730.

The Complaint alleges that some twenty-two overt acts done in connection with the conspiracy and representing the basis of plaintiffs' cause of action were committed by the defendants in widely scattered places including the State of Florida. Of the twenty-two overt acts, eleven were allegedly committed in the Northern District of Florida, ten of which occurred in the Tallahassee Division to which this action has been transferred for trial (R. pp. 32-43).

Of the four overt acts alleged to have been committed in the Southern District of Florida, not one occurred in the Orlando Division, where this action was originally commenced by the plaintiffs (R. pp. 45-50). Three were alleged to have been committed in Topeka, Kansas in conjunction with hearings before the Grand Jury which returned indictments against the plaintiffs (R. pp. 35-36); and four were alleged to have been committed in the District of Columbia in connection with the United States Post Office Department and the activities of its employees (R. pp. 31, 33, 34).

Domicile of the Parties

The petitioner, R. E. Crummer & Company, a Delaware corporation, engaged primarily in the refunding of the se-

curities of Florida taxing units from 1934 through the year 1942 (R. 629-30) and maintained offices in Florida, Kansas, and Illinois (R. 437-449). In 1942, it ceased to do business and according to records filed with the Secretary of the State of Delaware (R. 436) it distributed its assets among its ten stockholders[5] (R. 436) all of whom were members of the Crummer family. These persons are all domiciled outside the State of Florida. Since January 1, 1943 R. E. Crummer & Company has maintained no office and has had no employees within the State of Florida (R. 420). Its president, R. E. Crummer, has his legal residence in Reno, Nevada; its secretary and treasurer, Joy Bowerman, maintains the Company's only office in Chicago, Illinois. Its records are spread about, some in the possession of its auditor or attorneys in Wichita, Kansas, some at the only corporate offices now maintained in Chicago, Illinois, and some left with its co-defendant, The Crummer Company (R. pp. 419-423, inclusive).

In 1943, The Crummer Company, another Delaware Corporation, was formed, the main purposes and objects of which were to engage in the buying, selling and otherwise dealing in municipal securities of taxing units as distinguished from the main purposes and objects of the plaintiff, R. E. Crummer & Company, which had been to restore the credit of financially distressed Florida taxing units through refundings of outstanding securities (R. 21). Some of the former records and personnel of R. E. Crummer & Company were taken over by the new company, The Crummer Company (R. 629). The Crummer Company maintains its Florida office at Orlando (R. 354) and the existence or whereabouts of other offices is not disclosed.

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[5]All corporate stock was then surrendered to the corporation in connection with the distribution of its assets. (R. 435).

The defendants, Edward Ball and St. Joe Paper Company, are residents of the Northern District of Florida (R. 631) (the transferee forum), Edward Ball residing in the Tallahassee Division (R. 631), and St. Joe Paper Company having its principal offices in the Marianna Division (R. 631).[6]

The defendants, Jessie Ball duPont, Roger L. Main, Florida National Bank of Jacksonville, Clyde C. Pierce, Pierce Corporation and Cummer Sons Cypress Company, are residents of the Jacksonville Division of the Southern District of Florida (R. 631).

The defendants, E. J. Mansfield, Walter P. Fuller, S. Wallace Shafer, and Walter P. Gall are residents of the Tampa Division of the Southern District of Florida (R. 632).

The defendants, Howard S. Wheller, Paul L. Pierce, Loomis C. Leedy and Leedy-Wheeler-Alleman, Inc., are residents of the Southern District of Florida, Orlando Division (R. 631).

B. Events in the District Court

The Attorney General of the State of Florida petitioned the District Court for leave to appear as attorney on behalf of the defendants, Clement, Shafer, and Fuller (R. 318).[7] While such petition was pending and by permission of the Court, the Attorney General filed a Motion to Transfer the cause to the Tallahassee Division under Section 1404(a), 28 U.S.C. Such Motion was joined in and adopted by the defendants, Clement, Shafer and Fuller as their own Motion

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[6]Ball and St. Joe Paper Co. are two of the principal defendants (R. 23-27) whose overt acts are heavily relied upon (R. 27-29, 42).

[7]Florida Constitution, Article IV, Section 22; F.S.A. 16.01; *State* v. *Gleason* 12 Fla. 190.

(R. 337-339). All other defendants except two (R. 629) thereafter made similar motions to transfer, in most instances joining in the Attorney General's Motion and adopting it as their own (R. 340-345).

One of the defendants filing no motion to transfer was Mansfield, a retired post office inspector who is now represented by United States Government counsel; i.e. a United States attorney (R. 629). The other such defendant was Cummer Sons Cypress Company, one of the lesser defendants (R. 46), whose residence is in the Jacksonville Division.

After the filing of the Motions to Transfer, Judge Barker gave due written notice to counsel for all parties that a hearing would be held upon all motions to transfer and joinders therein (R. 465). At the hearing held on November 5, 1950 the only parties objecting to the transfer were the petitioners (R. 465). All defendants, except Mansfield and Cummer Sons Cypress Co., appeared responsive to the Judge's notice of hearing and vigorously urged the transfer (R. 465-546).

Following the hearing, Judge Barker made numerous findings of fact (R. 628) and ordered the case transferred to the Tallahassee Division pursuant to Section 1404(a) (R. 642).

The District Court in the findings of fact found, among other things, that due to the scope of the action set forth in the pleadings, as indicated above, that: (a) the best centralized source of documentary proof needed at the trial was in Tallahassee in the offices of various State agencies (R. 635-638); (b) because of the long period of time covered by the pleadings and the technical nature of the subject matter of the suit that documentary proof would be an important source of evidence for both parties (R. 639); (c) ten of the twenty-two alleged overt acts occurred in the

Tallahassee Division, the transferee forum (R. 633) and none occurred in Orlando, the transferor forum (R. 633); (d) many, if not most, of the witnesses, for both parties, would come from around Tallahassee, the locale of two thirds of the Florida overt acts (R. 641); (e) in view of the expected long trial and the condition of the respective dockets, a speedier trial was much more likely in the Tallahassee Division (R. 641); and (f) the action could have been originally brought in the Tallahassee Division, within the meaning of Section 1404(a) and Section 1392(a) of 28 U.S. Code (R. 632).

Judge Barker, after an examination of all factors (R. 642) in terms of "convenience of parties and witnesses, in the interest of justice" found that "the Record shows that a sufficient weight of factors favoring the transfer has been established to impel the granting of the motion to transfer." He found and concluded the convenience of parties and prospective witnesses would be better served by the transfer (R. 642) and that in the interest of justice the transfer should be made (R. 642).

It was apparent that the District Judge considered the domicile of all parties (R. 629, 631); the location of their records (R. 639), and the sources of other documentary evidence (R. 635-639); the witnesses likely to be called by both parties at the trial (R. 640) and the location of the alleged overt acts (R. 633) in making his decision as to the "convenience of parties and witnesses."

C. The Proceedings in the Court of Appeals

On April 24, 1951, the petitioners filed a motion in the Court of Appeals for the Fifth Circuit for leave to file a petition for mandamus or other relief to be directed to Judge Barker, to vacate and set aside the transfer order, attaching

as exhibits to said motion and petition, copies of all appropriate proceedings below (R. 665). After oral argument and upon consideration of the motion for leave to file and the said petition, the Court of Appeals denied the motion without opinion on April 24, 1951 (R. 665). This Court on Dec. 11, 1951 denied certiorari to review that decision. (*The Crummer Co. & R. E. Crummer Co.* v. *Barker,* October Term, 1951, No. 323).

Petitioners claim that this proceeding was not an appellate hearing on the merits to review the transfer order (Pet. Brief p. 14). However, Judge Borah who wrote the opinion below (196 F. 2d 468) and who was one of the judges sitting at the April 24, 1951 hearing, had a different opinion. He stated in regard to the prior hearing at p. 469 of 196 F. 2d:

> "After oral argument and upon full consideration of the proceedings below, this Court entered its order denying the motion for leave to file a petition for writ of mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion.
>
> "Having failed to secure relief in this Court by mandamus, the appellants perfected this appeal, again seeking a review of the order of transfer * * *."

Counsel for petitioners are also mistaken in their statement that the entire mandamus proceeding in the Court of Appeals was completed in less than an hour. While not pertinent here, it is safe to observe that more nearly the greater part of the working day was spent from the time of filing the petitioners' motion for leave to file a petition for mandamus, the argument of counsel and the subsequent consideration by the Court.

After motion for leave to file was denied, the petitioners docketed an appeal from the transfer order in the Court of

Appeals and requested that the appeal, if necessary, be treated as an application for such extraordinary relief as might be proper for the purpose of setting the transfer order aside.[8]

In response, the respondents herein filed motions to dismiss the appeal on the ground that the transfer order was not the type of interlocutory order which was appealable to the Court of Appeals (R. pp. 654-660), and likewise filed briefs on the merits subject to the motion to dismiss.

As stated above while the appeal was pending, petitioners applied for certiorari to this Court to review the decision of the Fifth Circuit denying their motion for leave to file for mandamus. (*The Crummer Co. and R. E. Crummer & Co.* v. *Barker*, October Term, 1951, No. 323). This Court denied certiorari on December 11, 1951.

The Court of Appeals on March 3, 1952 heard the appeal in full and allowed full argument from counsel upon the merits of the transfer order as well as upon the motions to dismiss. On May 2, 1952 the Court below entered its order (R. 666) which is now the subject of the present application for certiorari. In its opinion, the Court said at p. 469 of 196 F. 2d:

> "* * * After oral argument and upon full consideration of the proceedings below, this court entered its order denying the motion for leave to file a petition for writ of mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion.
>
> "Having failed to secure relief in this court by mandamus, the appellants perfected this appeal, again seeking a review of the order of transfer. In response, the appellees filed a motion to dismiss the appeal and that motion is now pending for disposition.

[8]This was in effect a second application to the Court of Appeals for extraordinary relief. See footnote 1 on page 1.

"It is clear that the transfer order, being interlocutory and not falling within one of the exceptions provided by statute[9] is not appealable. * * *"

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix "A," infra, pp. 29-30.

ARGUMENT

Petitioners' questions presented (see footnote 2 on p. 2) appear to be broader than their specification of errors to be urged, which are hereinafter set forth. Petitioners claim that the Court of Appeals erred[10] (Pet. p. 16):

1. In sanctioning the transfer order of the District Court, although it was based upon wholly inadequate grounds and constituted an abuse of discretion amounting to a usurpation of power.

2. In dismissing plaintiffs' appeal, or in the alternative, in failing to consider the appeal as an application for extraordinary relief and grant same.

3. In denying plaintiffs any relief whatever.

Summary of Argument

Petitioners seek to complicate this review and to obscure the real and major question for review by this Court, namely, did the Court of Appeals properly dismiss the appeal from the interlocutory transfer order?

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[9]See 28 U.S.C. sec. 1291 and 1292.

[10]The above named specifications of errors to be urged are almost identical with the specification of errors to be urged which were set forth by petitioners upon the prior certiorari proceeding in this Court, *The Crummer Co., et al.* v. *Barker,* October Term, 1951, No. 323, petition for certiorari at p. 7.

In order to relitigate the question of the abuse of judicial discretion by the District Judge and to obtain a second review thereof in this Court, petitioners assert that the Court of Appeals below has not, in the two appellate proceedings granted the petitioners, accorded them a review of Judge Barker's order. This contention is refuted by the opinion of Judge Borah (R. 665) and by the record in this proceeding and in the prior proceeding in this Court.[11]

Point I will show that the Court of Appeals has accorded a review of whether the District Judge abused his judicial discretion under 1404(a) and that the Court below correctly ruled that the appeal from the interlocutory transfer order should be dismissed.

Point II will show that the decisions below do not conflict with *Gulf Oil Corp.* v. *Gilbert*, 300 U.S. 501, and applied proper principles of law in their consideration of Section 1404(a).

Point III will show that the decision of the Court of Appeals is not in conflict with the decision of the Court of Appeals for the District of Columbia in *Wiren* v. *Laws*, 194 F. 2d 873, in connection with controlling legal principles and standards applicable to transfers under Section 1404(a) and the reviewability of such orders.

Point I.

The Decision of the Court of Appeals to Dismiss the Appeal From the Interlocutory Transfer Order Was Right.

Petitioners contend that the decision of the Court below to dismiss the appeal denied them any review of the District Judge's transfer order and therefore held that an erroneous

[11] *Crummer, et al.* v. *Barker*, October Term 1951, No. 323.

transfer order is not reviewable at all. This contention is without merit and does not accord with the decisions of the Fifth Circuit.

The record, as has been previously pointed out (at p. 8, 9), clearly shows that petitioners have had a review of whether the District Judge abused his judicial discretion under 1404(a). The petitioners first sought to vacate the transfer order under Section 1404(a) through mandamus proceedings in the Court of Appeals. Judge Borah, who participated in those proceedings, summarized their scope in these words (196 F. 2d at p. 469):

> "After oral argument and upon full consideration of the proceedings below, this Court entered its order denying the motion for leave to file a petition for mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion."

Petitioners' application for writ of certiorari to review and reverse the order denying this motion for leave to file was denied by this Court on December 11, 1951.

In according a review of the transfer order via the mandamus route, the Court of Appeals followed its earlier decision in *Atlantic Coast Line* v. *Davis*, 185 F. 2d 766 (C.A. 5, 1949) wherein the Court had ordered issuance of a writ of mandamus to correct an erroneous 1404(a) transfer order.

Petitioners rely heavily in this proceeding upon the case of *Wiren* v. *Laws*, 194 F. 2d 873 (App. D. C. 1951) (Pet. Brief pp. 27-28). The Court in the Wiren case cited with approval, the decision of Fifth Circuit in the Davis case, which held that mandamus would lie to review transfer orders, in order to sustain its own decision to review a transfer order in that manner.[12]

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[12]Footnotes 1 and 3, pp. 874 and 875 of 194 F. 2d.

There can be no doubt therefore that the Fifth Circuit has not ruled that erroneous transfer orders are not reviewable at all, in fact its decisions are recognized to be to the contrary, i.e., that in appropriate cases they can be reviewed by mandamus proceedings.

In view of Judge Borah's opinion and the foregoing facts, there is no merit to the contention that no review of the District Judge's order was accorded the petitioners.[13]

The contention that transfer orders are appealable under the rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not supported by the decisions. It is significant that petitioners admit that all Courts of Appeal which have considered transfer orders under Section 1404(a) have held that such orders are interlocutory and non-appealable.[14] They have ruled that such orders are not final decisions within the meaning of 28 U.S.C. 1291, nor are they the pe of appealable interlocutory orders which are specifically t forth in 28 U.S.C. 1292.

Petitioners also admit that four Courts of Appeal have pecifically rejected the Cohen doctrine as being inapplicable to transfer orders, (Pet. Brief at p. 23):

Ford Motor Co. v. *Ryan*, 182 F. 2d 329, 330 (C.A. 2, 1950);

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[13]Particularly, in view of the fact that the Court allowed full reargument at the appeal hearing on March 3, 1952. See ante at p. 11.

[14]*Jiffy Lubricator Co.* v. *Stewart Warner Corp.*, 177 F. 2d 360 (4 Cir., October 10, 1949); *Magnetic Engineering & Mfg. Co.* v. *Dings Magnetic Separator Co.*, 178 F. 2d 866 (2 Cir., January 4, 1950); *Koons* v. *Kaufman*, 187 F. 2d 1023 (2 Cir., October 6, 1950); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2 Cir., May 8, 1950); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3 Cir., December 6, 1950); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9 Cir., December 14, 1950); *Clinton Foods* v. *U.S.*, 188 F. 2d 289 (4 Cir., April 2, 1951); *Nicol* v. *Koscinski*, 188 F. 2d 537 (6 Cir., April 25, 1951); *Wiren* v. *Laws*, 194 F. 2d 873 (App. D.C. Dec. 27, 1951).

Paramount Pictures v. *Rodney*, 186 F. 2d 111, 112 (C.A. 3, 1950);

Shapiro v. *Bonanza Hotel Co.*, 185 F. 2d 777, 779 (C.A. 9, 1950);

Clinton Foods v. *United States*, 188 F. 2d 289, 292 (C.A. 4, 1951).

In those decisions the Courts of Appeal declared that a transfer order did not represent claims of rights separable from and collateral to rights asserted in the action as a whole and too important to be denied review.

Petitioners contend there has been no consideration of the later Cohen doctrine cases. Four of the Circuit Courts of Appeal reached their conclusion a considerable time after the Cohen case and the later case of *Swift & Co.* v. *Compania Columbiana de Caribe*, 339 U.S. 684 (1950) had been decided. It seems an unwarranted assumption that the counsel involved as well as the Circuit Courts themselves would have overlooked the *Swift* case, if such decision had been applicable to the question of appealability of 1404(a) transfer orders.

This Court has had the *Cohen* and *Swift* cases called to its attention, in connection with the question of whether 1404(a) orders are appealable, in the petition for certiorari in *Ford Motor Co.* v. *Ryan*, 340 U.S. 851, 91 S.Ct. 79, 95 L.Ed. 624 (1950). Certiorari was denied and both the *Swift*

and *Cohen* cases were cited and argued in the Briefs filed in this Court by the petitioner and the respondents.[15]

Petitioners now contend that the recent application of the Cohen doctrine in *Stack* v. *Boyle*, 342 U.S. 1, 96 L.Ed. 7, Adv. Op. (1951), impels the conclusion that transfer orders under 1404(a) are appealable. A brief review of that case will demonstrate it is not applicable here. There was no question of transfer or venue in that case but the vital question presented was whether in criminal cases in the case of non-capital offenses the traditional right to freedom before conviction should be preserved. The denial of a motion to reduce excessive bail was held to be appealable. Therefore, the case presents no similarity in fact or in law to a transfer order under 1404(a).

The most recent case deciding that 1404(a) cases are not appealable, *Wiren* v. *Laws*, 194 F. 2d 873, was argued and decided after the decision in the *Stack* case was rendered, and it would be unwarranted to assume that this decision was overlooked by counsel and the Court in that case.

The *Wiren* case was cited and argued to the Court of Appeals during the course of argument on March 3, 1952 at

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[15]In support of their contention that the Court of Appeals for the Second Circuit had erred in refusing to review upon appeal, a district court transfer order, Petitioners stated in their Brief at page 7: "The present petition insofar as it seeks review of the decision of the Court of Appeals dismissing the appeal to that Court is predicated on the belief that the order of the District Court refusing transfer constituted final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. *Cohen* v. *Beneficial Loan Corp.* 337 U.S. 541, 546-7 (1949); *Swift & Co.* v. *Compania Caribe* 339 U.S. 684, 688-689 (1950)".

Respondents disposed of this contention in their Brief in Opposition to Petition for Certiorari at pages 12-13 stating: "The petition, page 7, also cited without discussion *Swift & Co.* v. *Compania Caribe* 339 U.S. 684, 688-689 (1950). That case involved an order of the District Court vacating the attachment of a vessel in an admiralty proceeding, and bears no resemblance to the present case."

the appeal hearing by counsel for petitioners. The Court therefore must have considered this case before rendering its decision to dismiss the appeal.

The decisions of all of the courts regarding 1404(a) orders clearly compelled the Fifth Circuit to dismiss the appeal from the interlocutory transfer order and no decision of this Court or of any Court of Appeals is contrary.

Contrary to petitioners' contention, the Court below did not decline to treat the petitioners' appeal in the alternative as a petition for extraordinary relief. They allowed full reargument on appeal. In view of the prior mandamus hearings to review the transfer order and a relatively unchanged record on the subsequent appeal, they properly refused to exercise their discretionary power to grant petitioners' alternative plea and second petition for extraordinary relief.

At no time in this proceeding has the Fifth Circuit ever held that an erroneous transfer order is not reviewable at all and hence this contention of the petitioners must fall. The Court below rightfully dismissed the appeal from the interlocutory transfer order.

Point II.

The Decisions of the District Court and Court of Appeals Were Right. They Are Not in Conflict with Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

The petitioners urge in their brief that Section 1404(a) represents largely a codification of existing practice and standards under the long applied doctrine of forum non conveniens as enunciated recently in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). They contend that when the Court of Appeals refused to set aside the order of the District Court upon appeal, it repudiated

the forum non conveniens doctrine embodied in Section 1404(a). Therefore, the petitioners claim that the Court decided an important question of federal law which should be settled by this Court, to-wit: the precise applicability, if any, of the *Gulf Oil* case standards to Section 1404(a) transfer motions.[16]

They further argue that had the Gulf standards been applied, no transfer order could have resulted. Essentially, the petitioners' argument that had Gulf Oil standards been applied no transfer order would have resulted, can be reduced to two contentions: (1) that the decision of this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), a forum non conveniens case decided prior to the enactment of Section 1404(a) settled the exclusive criteria and standards for transfer under 1404(a) (Pet. Brief p. 20) and (2) that the District Judge in ordering the transfer violated the standards of the *Gulf Oil* case.

(1) The District Judge did not Violate Standards of Gulf Oil Case.

Even if the standards established in the *Gilbert* case should be exclusively applied in the determination of motions under Section 1404(a), the decision of the District Court would not be erroneous. The record before the District Court met the requirements as stated in the *Gulf Oil* case.[17]

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[16]Petitioners made almost this same plea and claim in their former application to this Court. *The Crummer Company, et al.* v. *Barker*, No. 323, October Term 1951, (Pet. p. 7-9).

[17]"Relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to action; and all other practical problems that make trial of case easy, expeditious and inexpensive." (p. 508, 330 U.S.).

The argument of the petitioners runs to the weight (Pet. Brief p. 18) which the district judge accorded certain factors and to the conclusions which he reached in attempting to resolve the conflicting facts presented by the motions and affidavits in the record. It is apparent that he accorded consideration to all relevant factors including those set forth in the *Gulf Oil* case.

The petitioners are fundamentally seeking a second review of the decisions below which turns solely upon an analysis of the particular facts involved and where merely the facts are in dispute. The findings of fact made by the District Judge under the discretionary power granted by Section 1404(a) were undisturbed and impliedly approved by the Court of Appeals. In that situation this Court has often held that "a court of law, such as this court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 275 (1950); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U. S. 232, 236, 94 L.Ed. 22 (1949).

Contrary to petitioners' argument, (Pet. Brief p. 18) the District Judge considered the "private interests" of all parties, including The Crummer Company, for his findings show clearly a consideration of their respective domiciles (R. 629-631); the location of their records (R. 639) and their witnesses (R. 640). Petitioners do not claim a lack of consideration of the factor of "relative ease of access to sources of proof" but disagree with the conclusions of fact reached by the trier of fact, the district judge (Petitioners' Brief, p. 8). No disregard of this *Gilbert* case factor is apparent.

In contrast to petitioners' argument (Pet. Brief, p. 9-10), the findings show that the district judge carefully considered the standards of the *Gilbert* case concerning trial witnesses.[18] In regard to witnesses, the district judge noted that the situation was highly speculative for neither side had identified by name or tentative list, witnesses expected to be called at the trial, either willing or unwilling (R. 640). He found that it was likely that many of the witnesses would come from in and about the Tallahassee Division, the locale of two-thirds of the alleged Florida overt acts (R. 640-641)[19] and the Florida Attorney General's affidavit so stated (R. 404).

There can be no doubt that the defendants themselves will be present at the trial in order to testify in their own defense and to present their case. Their absence at that time would be too prejudicial to even be seriously contemplated or considered.

Petitioners did not make any claim below that any taxing unit officials from the Southern District would be unwilling witnesses and that a subpoena would be necessary to obtain their presence at the trial (R. 640). The Gulf Oil standard as to witnesses was met.

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[18](a) Availability of compulsory process for attendance of unwilling witnesses, (b) cost of obtaining attendance of willing witnesses.

[19]The essence of a civil cause of action under the anti-trust laws is injury directly caused by an overt act committed in violation of the anti-trust laws. Right of recovery in civil action for damages resulting from conspiracy in restraint of trade is not based upon the conspiracy itself but upon injuries resulting from the overt acts themselves done pursuant thereto. *Foster & Kleiser Co.* v. *Special Site Sign Co.* (C.C.A. 9, 1936) 85 F. (2d) 742, cert. den. 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452; *Sucklow Borax Mines Consol.* v. *Borax Consol. Ltd.* 81 F. Supp. 301, Aff. 185 F. (2d) 196, cert. den. 340 U.S. 943, 95 L.Ed. 418, 71 S.Ct. 506. Mere charges of conspiracy cannot support a civil action for treble damages. *Tilden* v. *Quaker Oats Co.* (C.C.A. 7, 1924) 1 F. (2d) 160.

Petitioners contend (Pet. Brief p. 18) that the district judge failed to adhere to the Gulf Oil standard that "unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should rarely be disturbed." The district judge, though not using the precise words of the *Gilbert* case, found (R. 642):

> "upon examination of all factors in terms of parties and witnesses, in the interest of justice, the record shows that a sufficient weight of factors favoring the transfer has been established to impel the granting of the Motion to Transfer."

The foregoing is essentially a finding of "a strong balance of factors" in favor of the transfer.

(2) District Judge's Power to Transfer under Section 1404(a) is not Limited to Pre-Existing Standards announced under the old Forum Non Conveniens Doctrine.

The enactment by Congress of Section 1404(a) granted the trial courts a greater discretion to transfer cases than they formerly could exercise under the doctrine of forum non conveniens.

Prior to the enactment of Section 1404(a), when a plaintiff selected a highly inconvenient forum as determined by the tests enunciated in the *Gulf Oil* case, he was faced with a possibility that his action would be dismissed under the doctrine of forum non conveniens. The remedy granted by that doctrine was drastic. Such a plaintiff was to be relegated to the uncertainties of again obtaining jurisdiction over the defendants with the possibility that the applicable statute of limitations might have run by the time he did so. Moreover, he was required to undergo the expenses and trouble of beginning his action anew in another forum which, in all probability, was less convenient to him.

By enacting Section 1404(a) of the New Judicial Code, Congress remedied many of the shortcomings arising from application of the doctrine. By authorizing a transfer in lieu of dismissal, plaintiffs were no longer faced with the hardships referred to above. *Amalgamated Association, etc.* v. *Southern Bus Lines, Inc.* (C.C.A. 5, 1949) 172 F. 2d 946, 948. Moreover, the remedy allowing transfer from an inconvenient forum was enlarged to be available to defendants in numerous classes of cases to which the doctrine was theretofore not applicable.[20]

Chief Judge Parker, (one of the advisors to the Committee upon this legislation) speaking for his court in *Jiffy Lubricator* v. *Stewart Warner Corp.* (C.A. 4, 1949) 177 F. 2d 360, 362, said:

> "The notion that 28 U.S.C.A. Section 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not. See Ex parte Collett 337 U.S. 55, 69 S.Ct. 944 * * *."

By these reforms, Congress intended to more nearly equalize the rights of plaintiffs and defendants in the place of trial and when the plaintiff selects a forum which does not meet, in the terms of the statute, "the convenience of parties

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[20]Prior to the enactment of Section 1404(a), dismissal under the doctrine was granted only in actions to which the general venue statutes were applicable and denied in cases such as treble damage suits and action brought under the Federal Employer Liability Act to which special venue statutes were applicable. See *U.S.* v. *National City Lines, Inc.* 334 U.S. 573 (1948) (the first case) *Baltimore & Ohio R. Co.* v. *Kepner* 314 U.S. 44 (1941).

and witnesses, in the interest of justice," the forum Court will transfer the action to a more appropriate forum.[21]

Though the criteria and standards announced in the *Gulf Oil* case may be useful guides in determining whether transfer should be affected under Section 1404(a), they are not exclusive guides. All relevant factors in terms of the "convenience of parties and witnesses in the interest of justice" should be considered in determining whether a proposed transfer should be made and were considered by the District Judge below.

As an afterthought, petitioners urge (Pet. Brief p. 19) that this Court should decide the precise applicability of the *Gulf Oil* case standards to Section 1404(a) transfer motions and set out a guide for the trial courts. The asserted conflict in decisions in the interpretation of Section 1404(a) arises primarily from differences in states of fact and not in the application of principles of law. Congress granted the District Courts considerable discretion under the statute to deal with the varied cases and factual situations. Congress has set forth the standard in Section 1404(a). The Federal Courts are, as stated by Judge Learned Hand,[22] "often faced with indeterminate and indeterminable standards; reasonable notice, reasonable cause, gross negligence, the requisite proof in fraud or criminal prosecution." The application of the provisions of Section 1404(a) by Courts is neither new nor unique in granting to the District Court broad discretion in determining involved factual questions.

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[21]Professor Moore, in his Commentary on the U.S. Judicial Code, distinguishes the old and the new as follows at page 209: "But it should be recalled that Justice Jackson was dealing (in Gulf Oil case) with forum non-conveniens at a time when, if applied, it now results in a transfer. As a consequence, Courts may now properly utilize the doctrine more freely than it was proper to do when dismissal resulted."

[22]*Ford Motor Co.* v. *Ryan* (C.A. 2, 1950) 182 F. 2d 329, 332.

Precise and exclusive standards would indeed destroy much of the discretion given to the trial judges by Section 1404(a) and thereby unreasonably restrict them in dealing with the varied cases presented by various motions to transfer.

The facts in this case were fully considered by Judge Barker and his order, we submit, is not in conflict with any decision of this Court. He did not, as charged by petitioners, (Pet. Brief p. 16), abuse his discretionary power under Section 1404(a).

Point III.

Decision of Court of Appeals Below Is Not in Conflict With Any Decision of the Court of Appeals for the District of Columbia.

Contrary to Petitioners' contention (Pet. Brief, pp. 25-27), the Fifth Circuit in dismissing the appeal from the interlocutory transfer order and in refusing to grant petitioners' second application for extraordinary relief to set aside the transfer order, did not render a decision in conflict with the decision of the Court of Appeals for the District of Columbia in *Wiren* v. *Laws*, 194 F. 2d 873 (1951). This contention is based primarily upon two arguments, i.e., that in the *Wiren* case (1) the Court adhered to the principles of *Gulf Oil Corp.* v. *Gilbert*, supra, and the District Court and Court of Appeals below refused to apply such principles and (2) the Court held that mandamus was the appropriate remedy to review a transfer order and the Fifth Circuit held to the contrary.

A brief review of that case will show that these contentions are not valid. In the *Wiren* case, the plaintiff had previously brought in the Federal Court in New York, a suit against certain defendants. Subsequently she brought suit in

September 1948 in the District of Columbia against the same defendants and alleged that final judgment against her in the New York suit was obtained by fraud and corruption. About a year and a half after the suit had been filed, the trial judge suggested sua sponte the transfer of the cause to New York under Section 1404(a). The District Judge entered an order of transfer on Oct. 25, 1950, more than two years after the filing of the complaint.

The Trial Judge, Judge Laws, treated the petitioners' District of Columbia suit "as comparable to a motion for a new trial on newly discovered evidence" and upon that basis he concluded that the convenience of the *Court* would be best served by transfer of the cause to the forum in which the prior litigation involving these parties had unfolded (194 F. 2d 873 at 875). Unlike the District Judge below in these proceedings,[23] Judge Laws, failed to adhere to the criteria set forth in Section 1404(a) "for the convenience of parties and witnesses, in the interest of justice" and based the transfer on the convenience of the Court.

The Court of Appeals clearly pointed this out in its opinion where it stated at page 875 of 194 F. 2d:

> "Whether a suit is 'comparable to a motion for a new trial of new discovered evidence' is pertinent only to the matter of the jurisdiction of the Court to hear the cause; it is not pertinent to transfer under 1404(a). Transfer vel non should be decided by weighing the plaintiff's privilege of choosing the forum against the inconvenience if any, caused either witnesses or defendants in the chosen forum."

This was the major question upon which the Court's decision was based.

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[23] See discussion at pages 19-22.

The Court, in order to show in a general way what criteria the District Court should have applied to 1404(a) situations, quoted from *Ford Motor Co.* v. *Ryan*,[24] 187 F. 2d 329 (C.A. 2, 1950) and the case of *Gulf Oil Corp.* v. *Gilbert*, *supra*.

Respondents have already pointed out, *ante* pages 19-22, that the District Judge below considered all relevant factors and standards including those stated in the *Gilbert* case. There is no conflict in the cases as to the applicability of the principle of the *Gulf Oil Corp.* case.

In connection with the reviewability of a transfer order, the *Wiren* case held that mandamus and not appeal was the proper form of review. It refused to consider the order of the District Court upon appeal; it did review it upon an application for mandamus. In this case, the petitioners correctly recognized at the outset that, in line with the principles enunciated in the subsequent *Wiren* case, mandamus represented the proper avenue for reviewing Judge Barker's order; they have long since petitioned the Court of Appeals for such writ of mandamus and were long ago denied the writ; and this Court upheld that denial by denying the petition for certiorari from that decision of the Court of Appeals. After losing their application for a writ of mandamus, the petitioners changed their position and asserted that they were entitled to a review by appeal of the transfer order.

Both the *Wiren* case and every decision of a Federal Court of Appeals which has considered the question have consistently held that such a transfer order is not an appealable order under Section 1292, 28 U.S.C. The *Wiren* case is

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[24]Petitioners unsuccessfully contended on the prior proceedings in No. 323, October 1951 Term that the above-cited case was in conflict with the refusal of the Court below to grant mandamus proceedings to set aside the transfer order.

not in conflict with the decision of the Court of Appeals for the Fifth Circuit herein on such point. On the contrary, the two decisions are in absolute accord. The petitioners have had their day in court upon their application for a writ of mandamus. They have no cause of complaint. Their claim that the Court of Appeals did not give adequate consideration of their application for a writ of mandamus (a contention not justified in view of the fact that the Court of Appeals had the application before it for the greater part of a working day, and that this Court refused to set their decision aside on certiorari) certainly does not create a right to another and different remedy and will not extend the scope of Section 1292. The Court of Appeals properly dismissed this appeal.

CONCLUSION

The petition for the issuance of writ of certiorari should be in all respects denied.

October 3, 1952.

Respectfully submitted,

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APPENDIX "A"

1. Title 28 U.S.C., Sec. 1404(a):
   Change of Venue

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. Title 28 U.S.C., Sec. 1254:
   Courts of Appeals; Certiorari; Appeal; Certified Questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

3. Title 28 U.S.C., Sec. 1291:
Final Decisions of District Courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

4. Title 28 U.S.C., Sec. 1292:
Interlocutory decisions

"The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting. June 25, 1948, c. 646, 62 Stat. 929.

End